Supreme Court, U.S.
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No. 92 - 621

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals erroneously interpret this Court's opinion in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), so as to require debtors under Chapter 13 of the United States Bankruptcy Code (title 11, United States Code) to pay interest on arrearages and other charges incident to curing a default with respect to an over-secured claim secured solely by a mortgage on real property which constitutes the principal residence of such debtors?

II. Did the Tenth Circuit Court of Appeals create or contribute to an inter-circuit conflict by (mis)reading this Court's decision in *United States v. Ron Pair Enterprises, Inc., supra*, as requiring a debtor under Chapter 13 to pay interest on both pre-petition arrearages **and other charges** in order to effect a cure of default as allowed by 11 U.S.C. § 1322(b)(5), where the claim in default is both over-secured and secured only by real property constituting the principal residence of the debtor, while other circuits have correctly held that such payments are not required, and in fact would violate the provisions of 11 U.S.C. § 1322(b)(2) which prohibits a chapter 13 plan from modifying the rights of holders of claims secured solely by security interests in real property which constitutes the principal residence of the debtor?

LIST OF PARTIES

In addition to the names of the parties to the proceeding appearing in the caption of the case, Ronnie Hannon and Rosetta Hannon were debtors before the United States Bankruptcy Court for the Northern District of Oklahoma and were parties to the consolidated appeals before the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioners aver that there are no parent or subsidiary companies to be listed herein.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, entered July 1, 1992, is reported at 968 F.2d 1036, and is reprinted in the Petition for Writ of Certiorari, Appendix page A-26. The unreported order of the United States District Court for the Northern District of Oklahoma, exercising its appellate jurisdiction over decisions of the Bankruptcy Court, is reprinted in the Petition for Writ of Certiorari, Appendix page A-18. The unreported trial court opinion of the United State Bankruptcy Court for the Northern District of Oklahoma, Honorable Stephen J. Covey and Honorable Mickey D. Wilson, are reprinted in the Petition for Writ of Certiorari, Appendix pages A-13 and A-16.

JURISDICTION

The opinion sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on July 1, 1992. The statutory provision conferring jurisdiction on this Court to review the opinions of the United States Court of Appeals for the Tenth Circuit by Writ of Certiorari is 28 U.S.C. § 1254(1). The Petition for Certiorari was docketed on September 28, 1992, and the Court granted the Petition on November 9, 1992.

STATUTES INVOLVED

This case involves the following federal statutes (which are fully reprinted in the Appendix to the Petition for Certiorari at pages A-1, A-2 and A-4): 11 U.S.C. §§ 506, 1322 and 1325. Pursuant to the provisions of the Supreme Court Rule 24.1(f), and due to the length of such sections, they are not set forth verbatim herein, having been previously set forth in the Petition for Writ of Certiorari.

The following Oklahoma state statutes, which are reprinted hereafter, are also involved herein: 14A *Okla. Stat.* §§ 2-203 and 3-107 (provisions of the Uniform Consumer Credit Code).

14A OKLA. STAT. § 2-203. DELINQUENCY CHARGES

(1) With respect to a precomputed consumer credit sale, refinancing, or consolidation, the parties may contract for a delinquency charge on any installment not paid in full within ten (10) days after its scheduled due date in an amount not exceeding the greater of:

(a) an amount, not exceeding Five Dollars ($5.00), which is five percent (5%) of the unpaid amount of the installment; or

(b) the deferral charge (subsection (1) of Section 2-204) that would be permitted to defer the unpaid amount of the installment for the period that it is delinquent.

(2) A delinquency charge under paragraph (a) of subsection (1) may be collected only once on an installment however long it remains in default. No delinquency charge may be collected if the installment has been deferred and a deferral charge (Section 2-204) has been paid or incurred. A delinquency charge may be collected at the time it accrues or at any time thereafter.

(3) No delinquency charge may be collected on an installment which is paid in full within ten (10) days after its scheduled installment due date even though an earlier maturing installment or a delinquency charge on an earlier installment may not have been paid in full. For purposes of this subsection payments are applied first to current installments and then to delinquent installments.

(4) The parties to a revolving charge account accessed by a seller credit card or similar arrangement may contract for a delinquency charge with respect to a payment due in connection with a billing cycle, to be payable if the payment is not made in full within ten (10) days after its due date. The delinquency charge may not exceed the greater of five percent (5%) of the unpaid amount of the payment or the dollar amount provided by the rule of the Administrator in effect for this section pursuant to Section 1-106 of this title. No more than one delinquency charge may be imposed in each billing cycle and it may be collected at any time after it accrues either independently of any payment made on the account or from a payment made if the seller discloses delinquency charges to the buyer as they are imposed and informs the buyer of the full amount that the buyer must pay for the applicable period in order to remain current on the account.

14A OKLA. STAT. § 3-107. DEFINITIONS: "LENDER"; "PRECOMPUTED";"PRINCIPAL"

(1) Except as otherwise provided, "lender" includes an assignee of the lender's right to payment but use of the term does not in itself impose on an assignee any obligation of the lender with respect to events occurring before the assignment.

(2) A loan, refinancing, or consolidation is "precomputed" if the debt is expressed as a sum comprising the principal and the amount of the loan finance charge computed in advance.

(3) "Principal" of a loan means the total of

(a) the net amount paid to, receivable by, or paid or payable for the account of the debtor;

(b) the amount of any discount excluded from the loan finance charge (subsection (2) of Section 3-109); and

(c) to the extent that payment is deferred

(i) amounts actually paid or to be paid by the lender for registration, certificate of title, or license fees if not included in (a); and

(ii) additional charges permitted by this article (Section 3-202).

STATEMENT OF THE CASE

The relevant facts in each of the underlying Chapter 13 Bankruptcy proceedings, consolidated for appellate purposes, are virtually identical, as follows:

Petitioners in this consolidated review are mortgagors of various real estate mortgages which secure the Respondent as to repayment of the Petitioners' respective promissory notes, and which were made payable to Respondent's assignor, Jim Walter Homes, Inc. Each promissory note constitutes a precomputed consumer loan under the Uniform Consumer Credit Code as adopted in the State of Oklahoma. Each of the debts to Respondent is secured only by a security interest in the particular real property which constitutes each of the Petitioners' principal residence. Each debt to Respondent constitutes a claim, pursuant to the provisions of the United States Bankruptcy Code.[1]

[1] Title 11, United States Code.

As to each claim, the Respondent is considered to be "over-secured", as the value of the particular collateral securing each claim of Respondent exceeds the amount of each such claim.

Each petitioner was in default of the terms of his or her promissory note to Respondent as of the date of commencement of each respective Chapter 13 bankruptcy proceeding. Each Chapter 13 plan proposed to repay the amount of the then existing arrearage to the Respondent over the life of each such Chapter 13 plan, without payment of interest, but including the contractually bargained for late payment penalties. None of the security interests or promissory notes herein concerned provided for any separate charge for interest on late payments of any regular installment due, each such note providing for a maximum late payment penalty of Five Dollars ($5.00) per late payment - without regard to when such default was to be cured.

Respondent timely objected to treatment afforded his various arrearage claims in the underlying bankruptcy proceedings, and the bankruptcy court denied each of these objections. (Appendix to Petition for Writ of Certiorari, pages A - 7, A - 13, and A - 16)

The United States District Court for the Northern District of Oklahoma, sitting in its appellate capacity, affirmed the decisions of the bankruptcy court. (Appendix to Petition for Writ of Certiorari, page A - 19)

The United States Court of Appeals for the Tenth Circuit reversed and remanded, holding that "in Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid." (Appendix to Petition for Writ of Certiorari, page A - 41)

The Tenth Circuit has misinterpreted this Court's holding in *United States v. Ron Pair Enterprises, Inc., supra*, both in requiring interest to be paid on arrearages being cured under a Chapter 13 plan, as well as requiring interest to be paid on other charges incident to curing under 11 U.S.C. § 1322(b)(5), such as attorney's fees, late payment penalties and, in an appropriate case, costs of foreclosure.

Petitioners request this Court to reverse the Tenth Circuit Opinion and resolve the inter-circuit conflict by clarifying the correct rule, that interest may not be required to be paid, as an incident of cure under 11 U.S.C. § 1322(b)(5), in those instances in which the documents underlying the secured claim do not provide for the payment of such interest.

SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case holds that in order to cure a default of a "home mortgage"[2] and maintain regular payments under Chapter 13 of the Bankruptcy Code, debtors must pay interest on all arrearages, and other charges (such as advanced insurance, attorney fees and foreclosure expenses), even if the mortgage instruments are silent on the subject and state law would not require such interest to be paid.

The court of appeals opinion relied upon this Court's holding in *Ron Pair, supra*, as well as *Cardinal Federal Savings & Loan Association v. Colegrove*, 771 F.2d 119 (6th Cir. 1985).

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[2] For the purposes of brevity, Petitioners' brief will use the term "home mortgage" to refer to a claim secured only by a security interest in real property which constitutes the debtors' principal residence, as indicated in 11 U.S.C. § 1322(b)(2).

Interest is not required to be paid to a home mortgagee in order to cure a defaulted home mortgage under Chapter 13, however. The plain meaning of Bankruptcy Code § 1322(b)(2) prohibits the result reached in the opinion of the court of appeals.

In *Ron Pair, supra*, this Court was not called upon to interpret the interplay of the general statute, Bankruptcy Code § 506(b), with the more specific provisions of Section 1322(b)(2). The *Ron Pair* decision involved an involuntary tax lien on property of a Chapter 11 debtor. In a Chapter 11 proceeding under the Bankruptcy Code, all secured claimants which are impaired must either consent to treatment proposed in a plan of reorganization, or must be paid the present value of their allowed secured claims pursuant to Bankruptcy Code § 1129(a)(7). *Ron Pair, supra*, did not involve an interpretation of the specific provisions of Chapter 13 of the Bankruptcy Code as they relate to the general sections found in Chapter 5 of the Code. For this reason *Ron Pair, supra*, is inapplicable to the facts presented herein.

To require that interest be paid in order to cure a defaulted, oversecured home mortgage, where such interest is not included within the contract documents, violates the provisions of Bankruptcy Code § 1322(b)(2), prohibiting plan modification of the terms of a home mortgage.

The opinion of the court of appeals, to the extent that it relies upon *Colegrove, supra*, is also in error. The opinion in *Colegrove* erroneously assumed that § 1325(a)(5)(B)(ii) was applicable to a home mortgage cure situation in Chapter 13. This is not so. This particular paragraph of Section 1325, in certain circumstances, requires the present value of an allowed secured claim be paid in order to present a confirmable plan to the bankruptcy court. The error of the court of appeals in *Colegrove, supra*, was in not recognizing that Code § 1325(a)(5)(B)(ii) is the Chapter 13 "cram down" provision. "Cram down", as used in the bankruptcy context, necessarily implies a

modification of the claim of the secured claimant. Such modification could be in terms of the allowed secured claim amount, the interest rate proposed to be paid, or the term in which such repayment would be effected. The terms of a home mortgage, however, may not be modified in a Chapter 13 plan pursuant to the provisions of Bankruptcy Code § 1322(b)(2). Therefore, *Colegrove, supra*, is in error by presupposing the applicability of the Chapter 13 "cram down" provisions to a home mortgage claim.

More fundamentally, the curing of a home mortgage arrearage in a Chapter 13 context is determined by applicable non-bankruptcy law and not by Section 506(b) of the Code. Respondent's claims in the matters presented to the bankruptcy court were not created by the Bankruptcy Code, but were created in accordance with the contract between the parties and applicable non-bankruptcy law, here state law. Additionally, the defaults by the Petitioners are not determined by the Bankruptcy Code, but rather are conditions brought about by the non-payment of installments when due. The legal consequence of a default by reason of non-payment of a home mortgage is determined, not by a reference to the Bankruptcy Code, but through the applicable state law of contracts. Cure of the default, then, is not a function of the Bankruptcy Code, or bankruptcy law, but is performed in accordance with the terms of the contract between the parties, as regulated by state law. Therefore, although a cure of a default in a home mortgage may be paid through a Chapter 13 plan, the cure is made by reason of and is governed by applicable non-bankruptcy law.

The opinion of the court of appeals below further compounds its error by requiring interest be paid, not only on the arrearage, but also on all other charges, including advanced insurance, attorney fees, costs of foreclosure, and any other recoverable expenses incurred by the claimant. This Court, in *Ron Pair, supra*, specifically dealt with the issue of what constituent items must be paid with interest in instances in which Bankruptcy Code § 506(b) does control. The only element which Code § 506(b) requires to be paid with interest is the

actual arrearage, and thus the court of appeals has misinterpreted the opinion of this Court in *Ron Pair, supra*, and should be reversed for that reason.

ARGUMENT

I. THE PLAIN MEANING OF THE CURE PROVISIONS IN CHAPTER 13, BANKRUPTCY CODE § 1322(b)(5), OPERATE TO THE EXCLUSION OF THE PROVISIONS OF § 506(b)

Where a Chapter 13 debtor wishes to reinstate a home mortgage (or indeed any defaulted, secured or unsecured claim on which the last payment is due after the final plan payment), Code § 1322(b)(5) permits the debtor to reinstate such long term debt by maintaining payments during the pendency of the Chapter 13 proceeding, and effecting a cure within a reasonable time. Because Code § 1322(b)(5) specifically controls notwithstanding the provisions of Code § 1322(b)(2), defaults in payments on home mortgages are permitted to be cured in a Chapter 13 context. Thus, the Bankruptcy Code itself has the effect of modifying the provisions of a home mortgage by prohibiting foreclosure and permitting "deacceleration" of the home mortgage. Although Code §1322(b)(2) otherwise prohibits the modification of a home mortgage in a plan, the Code itself supplies a modification function independently of the plan, authorizing a plan to provide for cure and reinstatement without modifying the terms of the home mortgage.

The reinstatement provisions of Code §1322(b)(5) are very narrow in application. They apply only to claims whose maturity dates extend past the end of the Chapter 13 plan, require maintenance of regular payments during the course of the Chapter 13 plan, and must provide for cure of the default within a reasonable time. This is clearly a special statute and must control over the general interest requirements of Code § 506(b). This Court, on numerous occasions,

has held that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976); and *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974).

This issue has been fully explored by the United States Court of Appeals for the Fourth Circuit, in the case of *Landmark Financial Services v. Hall*, 918 F.2d 1150 (4th Cir. 1990). In *Landmark*, the court of appeals, at 1154, stated:

> Section 506(b) provides the means by which the extent of a creditor's secured claim is established. ... By accretion, the value of the secured claim grows by the agreed charges and by interest from the date of filing through the confirmation date. A mortgage cure, in a sense, occurs outside the ambit of the [Bankruptcy] Code. Any charges such as late fees may indeed be payable by the mortgagor who elects to cure, but such charges would be mandated not by § 506(b) but, rather, because they are integral elements of the cure.

This position has also found support in the Third and Eleventh Circuits, in the cases of *Appeal of Capps*, 836 F.2d 773, 776 (3rd Cir. 1987) and *Foster Mortgage Corporation v. Terry*, 780 F.2d 894, 897 (11th Cir. 1985).

Bankruptcy Code § 1322 has been held by one circuit to be a specific statute which controls over the general applicability of Code § 506. *Wilson v. Commonwealth Corp.*, 895 F.2d 123 (3rd Cir. 1990). Additionally, where the statutory language employed by

Congress is clear, there is no need to look further than the language of the statute itself in determining its meaning. *Hellon & Associates, Inc., v. Phoenix Resort Corp.*, 958 F.2d 295 (9th Cir. 1992).

The plain meaning of Code § 1322(b)(5), therefore, marks the limits of what is required to reinstate a defaulted home mortgage in a Chapter 13 context.

The concept of curing a defaulted long term debt in Chapter 13 has its genesis in case law interpreting Chapter XIII of the former Bankruptcy Act, whereby bankruptcy courts would grant injunctions prohibiting foreclosure on mortgages during the pendency of the Chapter XIII case. See *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962). With the promulgation of the Bankruptcy Rules in 1973, the injunction became automatic upon the filing of the bankruptcy petition.

As the editor of *Collier on Bankruptcy* states:

> The Commission on the Bankruptcy Laws of the United States, in its Report to the Congress, recognized the difficulties in dealing with mortgages and other secured claims under the Act. Its proposed statute, the forerunner of the Code finally enacted, essentially codified the cases permitting injunctions against foreclosure and allowing a reasonable time to cure defaults. Moreover, since debts secured by real property were no longer excluded from treatment in the Commission's equivalent of Chapter XIII, the Commission's bill permitted inclusion of provisions to cure defaults on mortgages as part of the debtor's plan.
>
> The Commission's proposals were modified slightly during the legislative process thereafter, but

> the concept of allowing debtors to cure mortgage defaults survived intact. (footnotes omitted)

5 *Collier on Bankruptcy* ¶ 1322.09[2] (15th ed. 1992).

Code § 1325(a)(5)(B)(ii), the Chapter 13 "cram down" section, requires holders of modified secured claims be paid the present value of such allowed secured claims as a precondition to plan confirmation. Its inclusion in Chapter 13 is entirely independent of the cure provisions of Section 1322(b)(5). It is clear, therefore, that the enactment of Code § 1322(b)(5) was an outgrowth of pre-Code practice, and no Congressional intent to require interest payments as an incident to curing defaults is to be found in either Code § 1322(b)(2) or § 1325(a)(5)(B)(ii). This lends even more credence to the proposition that Code § 1322(b)(5) operates independently of the present value provisions of section 1325.

II. THIS COURT'S DECISION IN *RON PAIR* IS INAPPLICABLE TO A CODE § 1322(b)(5) REINSTATEMENT

The opinion of the court of appeals below rested heavily upon the rationale of this Court in *Ron Pair, supra*. That decision, however, involved a proceeding under Chapter 11 of the Bankruptcy Code. In fact, Chapter 13 would not have been available to the debtor in *Ron Pair, supra*, for the reason that Ron Pair Enterprises, Inc. is not a natural person, and therefore, under Code § 109(e) would be ineligible.

There are no correlative sections in Chapter 11 to Code § 1322(b)(5). Indeed, with respect to non-consenting secured but impaired classes, all must receive the present value of their secured claims pursuant to Code § 1129(a)(7).

Also, in *Ron Pair* the debtor was not attempting to cure a default and reinstate a long term debt, but was instead contesting the necessity of paying interest on an involuntary tax lien placed upon property of the estate by the Internal Revenue Service. The holding in *Ron Pair, supra*, is not applicable to the present proceeding for the reason that its facts are substantially different, involving entirely separate chapters of the Bankruptcy Code, and did not involve a specific statute (Code § 1322) which controlled over the more general one, Code § 506. Further, the holding in *Ron Pair, supra*, is limited to the issue of whether interest must be paid on voluntary versus involuntary secured claims in a Chapter 11 context.

In *Landmark, supra*, the court stated at 1154:

> [The mortgagee] also points to § 506(b) and a recent decision, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), as authority for the proposition that the bank, as an oversecured creditor, is entitled to postpetition interest on its arrearage claim during the pendency of the case, i.e., after filing but prior to confirmation. Ron Pair erased the consensual/nonconsensual distinction which some courts had used to deny § 506(b) interest on claims based on nonconsensual liens such as tax liens. Despite some broad language in Ron Pair, however, we think § 506(b) is inapplicable in the context of [Chapter 13] mortgage cures.

This view has also found support in the Ninth Circuit, in the case of *In re Laguna*, 944 F.2d 542 (9th Cir. 1990), wherein the court of appeals held *Ron Pair* inapplicable to a Chapter 13 home mortgage cure, for the reason that the mortgagee's right to postpetition interest was qualified by the interplay existing between Code §§ 1322(b) and 1325(a) with respect to modification and cure.

III. THE CHAPTER 13 "CRAM DOWN" PROVISIONS ARE INAPPLICABLE TO A HOME MORTGAGE REINSTATEMENT UNDERTAKEN PURSUANT TO CODE § 1322 (b)(5)

In all of Chapter 13 of the Bankruptcy Code, there is only one section involving the time value of money, and that is customarily referred to as the "cram down" provision of Chapter 13, Code § 1325(a)(5)(B)(ii). Judge Ginsberg, in *In Re Stamper*, 84 B.R. 519 (Bankr.N.D.Ill. 1988) extensively explored application of the Chapter 13 "cram down" section to residential mortgages. Judge Ginsberg, at 522, points out that Code § 1325(a)(5)(B)(ii) is clearly intended for the benefit of secured creditors whose rights **have been modified** by a Chapter 13 plan. Where the rights of a secured creditor have been modified in a Chapter 13 plan, the creditor is entitled to receive an additional amount for the time value of money. *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427 (6th Cir. 1982).

There can be no application of Code § 1325(a)(5)(B)(ii) where a creditor's only security consists of the debtor's home, because Code § 1322(b)(2) prohibits plan modification of the contractual rights of the holder of a principal residence mortgage, absent the mortgagee's consent. As Judge Ginsberg, in *In Re Stamper, supra*, so cogently observes at 522:

> Because the Bankruptcy Code permits an involuntary deacceleration and cure, the mortgagee's rights are not modified by such [Chapter 13 plan]. *In Re Capps*, 836 F.2d 773 (3rd Cir. 1987); *In Re Clark*, 738 F.2d 869 (7th Cir. 1984). Instead, the effect of the "cure" is to place the parties in their respective positions prior to the default. The other contract terms remain in force other than for the right to accelerated payments, and the mortgagee will receive all of the interest, charges, and costs to which it is entitled under the

> contract. 5 *Collier on Bankruptcy* ¶ 1322.09[4] (15th ed. 1988). Because the cure does not work a modification of the mortgagee's rights, "[t]he time value of money is irrelevant", *In Re Simpkins*, 16 B.R. 1956, 1965 (Bankr. E.D. Tenn. 1982), unless the contract specifically provides for interest on the arrears in the event of a cure.

Because the "cram down" provisions of Code § 1325(a)(5)(B)(ii) cannot be employed by a debtor to modify the rights of a home mortgagee, the time value of money provisions of the "cram down" section have no applicability in the home mortgage reinstatement context. As no other Chapter 13 provision provides for a present value test as a condition precedent to confirmation of a Chapter 13 plan, Code § 1325(a)(5)(B)(ii) provides no safe haven for the Respondent's position that postpetition interest must be paid.

Judge Ginsberg further observed in *In Re Stamper*, 84 B.R. at 522:

> In fact, under this analysis, to require a Chapter 13 debtor to pay interest on the arrears when the home mortgage agreement does not provide for such would be an impermissible modification of that home mortgage under 11 U.S.C. § 1322(b)(2). After all, nothing in 11 U.S.C. § 1322(b)(2) permits alterations in a home mortgage agreement which are detrimental to the debtor. All involuntary modifications are prohibited regardless of whether they would benefit the debtor or lender. If 11 U.S.C. § 1322(a)(5)(B)(ii) is read to require interest payments on arrears as a matter of law, it would conflict with 11 U.S.C. § 1322(b)(2). See *In Re Terry*, 780 F.2d 894, 896-897 (11th Cir. 1986).

Judge Ginsberg's view is supported in *Landmark, supra*, where the court observes that the "cram down" present value requirement of Code § 1325(a)(5)(B)(ii) is the means by which the Code compensates secured creditors for any modification of their rights. The court at 1154 stated:

> The present value test of § 1325 is designed to factor in the time value of the deferred payments in order to assure full satisfaction of [modified] secured claims.

The leading treatise on bankruptcy law also supports the proposition that, "cram down" being inapplicable to home mortgage cure in Chapter 13, no Bankruptcy Code - mandated interest is required to be paid on the amounts necessary to cure the default. The editors of *Collier on Bankruptcy*, at ¶ 1322.09[4] (15th ed. 1992) state:

> When a default on a mortgage or other long term debt is cured under section 1322(b)(5), the full amount of the creditor's claim is not paid during the chapter 13 cases. Rather, the debtor preserves the benefit of a longer payment schedule which extends beyond the due date of the last payment under the plan, and the creditor is protected by the exception to discharge for long term debts on which defaults are cured.
>
> Thus, the curing of defaults pursuant to section 1322(b)(5) is a right conceptually distinct from chapter 13 cramdown, which allows a debtor to modify the rights of secured creditors by reducing their payments or in other ways.
>
> ....

> However, ... neither the present value test of section 1325(a)(5) nor the best interests of creditors test of section 1324(a)(4) is applicable where a default is cured pursuant to section 1322(b)(5). The present value tests compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor's rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges and costs to which it is entitled under the contract and applicable nonbankruptcy law. (footnotes omitted)

IV. ELEMENTS OF A "CURE" OF THE DEFAULT IN A HOME MORTGAGE, IN A CHAPTER 13 CONTEXT, ARE DETERMINED BY RESORTING TO APPLICABLE NON-BANKRUPTCY LAW

Bankruptcy Code § 101(5) defines a claim as a right to receive payment or to other equitable relief. The Bankruptcy Code itself does not create the claim, but rather the claim is determined by virtue of state law giving rise to an indebtedness, in this case the obligations of the Petitioners to the Respondent which are secured by the home mortgages. Likewise, a default is not determined by resort to the Bankruptcy Code, but is a condition brought about by reason of the nonpayment of installments when due, pre-petition.

The concept of cure is not defined in Chapter 13 of the Bankruptcy Code. It is that series of events necessary to put the claimant in the position it would have enjoyed had no default occurred.

Absent the overlay of the Bankruptcy Code, in each of the home mortgages presented to this Court for consideration, Petitioners

could have paid the defaulted installments plus 5% of such installments or $5.00 per installment, whichever amount was less, as a one time penalty for late payment. That constitutes the agreement bargained for by the parties. Cure, therefore, consists of payment to the Respondent only of the delinquent installments, plus 5% or $5.00 per installment as a one time late payment penalty, as well as any other recoverable charges, such as attorney fees and costs.

The court in *Landmark, supra* at 1155, also holds that state law is the applicable nonbankruptcy law to determine any right to postpetition interest on prepetition arrearages:

> The valuation of the claim or the collateral is simply immaterial when the original agreement is reinstated and the debtor elects to make all the payments called for by the agreement. The mortgagee receives only the interest and other charges to which it is entitled under the agreement and **applicable nonbankruptcy** law. *Collier*, ¶ 1322.09[4]; *In re Laguna*, 114 B.R. 214, 216 (9th Cir. BAP 1990). (emphasis added)

As previously shown, Bankruptcy Code § 1322(b)(2) prevents a Chapter 13 plan from modifying the rights of a holder of a secured claim, which claim is secured only by real property constituting the debtors' principal residence. Since the "cram down" provisions of Chapter 13 are inapplicable to a home mortgage claim, the interest requirement as an incident to cure, which the Sixth Circuit found to exist in *Colegrove, supra*, is in irreconcilable conflict with the specific requirements with Code § 1322(b)(2).

As there is no prescribed method of cure found in Chapter 13, other than the requirement that it be performed within a reasonable time, and as the Bankruptcy Code in general does not specify the specific requirements necessary to effect a cure, it is necessary to resort to applicable non-bankruptcy law in order to determine the

specific requirements of curing a default. In the cases consolidated for review before this Court herein, the underlying contracts and the state law of Oklahoma concerning contracts is that applicable nonbankruptcy law.

Applicable state law is reprinted at the outset of this brief. The promissory notes involved herein (J.A. 8 and 24) are clearly precomputed consumer loans as set forth in 14A *Okla. Stat.* § 3-107.[3] Both notes are expressed as a sum comprising the principal and the amount of the loan finance charge, computed in advance. 14A *Okla. Stat.* § 2-203 prohibits these notes, as precomputed consumer loans, from making any charge in excess of $5.00 or five percentum of each delinquent installment, without regard to the length of the interval before payment of the delinquent installment. These provisions of Oklahoma state law have been enacted as a part of the Oklahoma adoption of the Uniform Consumer Credit Code. Respondent must have been aware of the application of this applicable state law, as its own form promissory notes (J.A. 8 and 24) provide for delinquency remedies which are exactly in conformity with the permitted late payment penalties set out in 14A *Okla. Stat.* § 2-203.

Virtually identical contract documents to those at issue herein were considered in this same context by the United States Bankruptcy Court for the Western District of Oklahoma in the case of *In re Pennick*, 108 B.R. 776 (Bankr.W.D.Okl. 1989), where the court stated at 778:

> In this court's opinion, the default provision constitutes a delinquency or late charge and nothing more. Under § 3-203(1)(a) of the Uniform Consumer Credit Code ("UCCC"), Okla. Stat. tit. 14A, § 1-101

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[3] Title 14A of the Oklahoma Statutes constitutes the Oklahoma version of the Uniform Consumer Credit Code, which has been adopted in Colorado, Guam, Idaho, Indiana, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming.

> *et seq.* (Supp.1990), a delinquency charge of not to exceed $5.00 is permitted with respect to a precomputed consumer loan (§ 3.107) such as this. In § 3-203(2), it is provided that such delinquency charge **"may be collected only once on an installment however long it remains in default."** (emphasis added)

Thus, Oklahoma law has invalidated Respondent's position that postpetition interest must be paid on the defaulted installments, as the value of the delinquency is incorporated in the $5.00 late payment charge.

As applicable Oklahoma law prohibits the payment of interest in the curing of the precomputed consumer loans at issue herein, and the contracts of the parties fail to include any requirement for paying interest as an incident to curing a default, no requirement for interest can be upheld in this Chapter 13 context. To do so would amount to granting to Respondent greater rights than those to which he would have been entitled absent the invocation of the bankruptcy court's jurisdiction. As shown in the underlying agreements (J.A. 8 and 24), the parties bargained and agreed and that if any installment was not paid within 15 days of its scheduled due date, the Petitioners would be charged $5.00 or 5% of the unpaid installment as a one time late fee, whichever amount was less.

Since as set forth above, Code § 506(b) has no applicability to a home mortgage cure scenario in Chapter 13, and as there are no remaining bankruptcy provisions which dictate the specifics of a home mortgage cure in Chapter 13, it is clear that cure is a concept determined by applicable non-bankruptcy law, which in this context consists of the agreement between the parties and state law.

V. ALTHOUGH *RON PAIR* IS INAPPLICABLE, THE COURT OF APPEALS MISREAD THAT CASE AS AUTHORITY FOR REQUIRING INTEREST ON FEES, COSTS AND OTHER CHARGES

Without conceding that there is any applicability of *Ron Pair, supra*, to the case presently before this Court, Petitioners urge that the court of appeals below misread *Ron Pair* as authority for its apparently preconceived notion that interest must be paid on fees, costs, or charges provided for under the agreement under which such claim arose, in order to effect a cure under Code § 1322(b)(5). In fact, this Court clearly stated that interest was to be paid only on the claim and that the grammatical rendition of the statute by Congress prohibited the imposition of interest on fees, costs, or charges provided under the agreement. *Ron Pair*, 489 U.S. at 241.

This very clear holding in *Ron Pair, supra*, was completely ignored by the Tenth Circuit, below, as in its concluding paragraph (see Appendix to Petition for Writ of Certiorari, page A-40) wherein the court of appeals stated:

> Thus, although we reason somewhat differently, we join the Sixth Circuit in holding that in Chapter 13 plans, an oversecured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages **and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid.** (emphasis added)

It seems clear that, although paying lip service to this Court's opinion in *Ron Pair, supra*, the court of appeals below was attempting to find a rationale for justifying its preconceived notion that Chapter 13 home mortgage cures must include full interest on the time value of money for any and all appropriate charges covered in the underlying

agreements. This conclusion, however, is inapposite to the specific provisions of Code § 506(b), as interpreted by this Court in *Ron Pair, supra*.

CONCLUSION

For the above reasons, Petitioners urge this Court to reverse the United States Court of Appeals for the Tenth Circuit and reinstate the judgment of the district court in favor of Petitioners.

Respectfully submitted,

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